

Why Janus Should Make Public Employers Think Twice

By **Daniel Altchek**

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In the months since the U.S. Supreme Court handed down its landmark decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*,^[1] striking down compulsory agency fees for public employees on First Amendment grounds, there has been extensive public discussion of the ruling's impact on public sector union finances, public employer operations, and even the potential implications for other compelled-fee organizations like bar associations. But there is another aspect of the court's ruling, which has received little attention, that could also have important implications for public sector employers and employees on the subject of promotions.



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Public employers seeking to fill a vacancy at the managerial level regularly receive applications from employees who are current or past union officers or representatives. Fair or not, in these situations, there often is a concern that such candidates, on account of their past union affiliation and activity, will not be sufficiently firm in dealing with their former union in collective bargaining or handling grievances or regular day-to-day supervision and direction. Sometimes there may also be resentment over the employee's past vigorous advocacy on behalf of the bargaining unit and its members. These considerations may doom the employee's candidacy for promotion. This begs the question: Does a public employee's union membership or activity enjoy constitutional protection under the First Amendment? If it does, there might be a problem with denying a promotion on that basis.

These circumstances were presented in a case recently decided by the Third Circuit, which involved a police officer who allegedly was denied a promotion to police chief because of his past role as a union officer. In examining the police officer's claim, the court recognized a circuit split over the scope of First Amendment protection of public employee union membership. But the court did not address how *Janus* may have already signaled a resolution of the circuit split, strengthening First Amendment protections for public employees in the process.

The Third Circuit Case: *Palardy v. Township of Millburn*^[2]

Michael Palardy spent 26 years as a police officer with the Township of Millburn, New Jersey, during which he served in various roles with the two unions representing the different ranks of the department's officers, including as a union delegate, vice president and president. Palardy estimated

that during his tenure he participated in four or five rounds of contract negotiations and at least two disciplinary hearings for fellow officers.

Throughout Palardy's career, the township had a single business administrator, Timothy Gordon, who was responsible for the township's personnel matters including decisions on promotions within the police department. The township's custom was to select its police chief from internal candidates. Palardy claimed that Gordon stymied Palardy's attempts to become police chief. According to Palardy, Gordon repeatedly made statements to other officers reflecting negatively on Palardy's union activity. For instance, Gordon told one officer that Palardy would never become chief "because of his union affiliation and being a thorn in my side for all these years." Another officer said that Gordon told him Palardy "wasn't a good supervisor ... because [he] was too close to [his] men and [he] would have problems separating [his] union business with police department work and being a supervisor." And Gordon told a former chief that Palardy "ha[d] to learn how to separate [him]self from the rank and file."

Palardy sued the township and Gordon for First Amendment retaliation under 42 U.S.C. § 1983. Of relevance here, Palardy claimed that Gordon had retaliated against him for exercising his First Amendment rights to free speech and association by preventing him from becoming chief of police. The threshold element for such a claim is whether the public employee engaged in constitutionally protected conduct.

To make that determination, the federal district court analyzed Palardy's speech and association claims together under a framework developed by the U.S. Supreme Court in cases involving allegedly protected speech by public employees.^[3] According to that line of cases, a public employee's speech is protected from retaliation by his/her employer only if the employee is speaking on a matter of public concern as a private citizen. The district court held that Palardy's union-related activity was not constitutionally protected because Palardy neither acted as a private citizen nor spoke out on a matter of public concern, and therefore his First Amendment claims failed.

The Third Circuit rejected the district court's approach of analyzing the free speech and association claims together. The court found that Palardy was asserting a "pure" associational claim because Gordon's alleged comments to the other officers indicated that Palardy was disqualified from becoming chief solely because of his union affiliation and membership — not because of Palardy's speech or advocacy on any particular issue. The question before the court was whether purely associational activity like Palardy's must satisfy the public concern and private citizen requirements that otherwise apply to free speech claims in order to receive constitutional protection.

The court observed that other circuit courts are split on this question. The majority of circuits, including the Second, Fourth, Sixth and Seventh Circuits, do apply the public concern requirement to public employee association claims. The other side of the split includes the Fifth and Eleventh Circuits, which have taken the opposite view. Meanwhile, the Ninth Circuit has applied the public concern requirement to "hybrid" speech and association claims but has not addressed the issue in the context of a pure association claim by a public employee, whereas the Tenth Circuit has rejected the public concern requirement in the specific context of public employee unions.

The court agreed with the minority side of the split and held that the public concern requirement should not apply to a pure association claim like Palardy's. In reaching that conclusion, the court endorsed the Fifth Circuit's view that public employee union association is always a matter of public concern.

In making its determination, the court made scant reference to Janus and only in connection with a subsidiary point. Its discussion of Janus did not extend to the primary issue in Palardy – i.e., whether a pure association claim based on public employee union membership must be based on a matter of public concern.

Thus, the Third Circuit held that Palardy's union membership and activity was indeed a form of protected associational activity under the First Amendment, satisfying the first element of a claim under §1983. The case was remanded to the district court to determine whether Palardy could satisfy the remaining elements of the claim — that the denial of his promotion to chief of police was retaliatory and causally connected to his protected activity.

Janus: Public Sector Collective Bargaining Is Always a Public Concern

The Third Circuit's minimal consideration of Janus in Palardy is surprising because Janus may already have undermined the basis for the circuit split that was so much of the Palardy court's focus. In Janus, the defenders of the status quo argued that compelled agency fees did not implicate the First Amendment because union speech in collective bargaining is basically a matter of private interest, not public concern. The Janus court noted that it had rejected this argument in *Harris v. Quinn*[4], and proceeded to describe a litany of ways in which public sector collective bargaining routinely involves matters of public concern. First and foremost, the court cited the issue of wages and benefits which, for an entire bargaining unit, plainly impacts budget allocations and priorities and is therefore a matter of public concern. But the court also found that public sector bargaining frequently touches upon policy disagreements and other politically controversial and sensitive topics, which are also matters of public concern. The court further observed that grievance-handling may also involve matters of public importance. In short, according to Janus, because so much of a public employee union's activities involve matters of public concern, the First Amendment prohibits compelled support for such activities in the form of mandatory agency fees.

Thus, the Janus court essentially defined public sector union activity as inherently involving matters of public concern. Under this reasoning, it would follow that a pure association claim like Palardy's that is based solely on union membership and performing the role of a union official (contract negotiations, grievance representation, etc.) also inherently satisfies the public concern requirement and is therefore entitled to First Amendment protection. In other words, the Supreme Court's reasoning in Janus aligns with the minority side of the circuit split: public employee unions generally engage in activities that are matters of public concern, and therefore an employee's association with a union, including his/her serving as a union officer, is protected associational activity under the First Amendment.

What Does it All Mean?

In the circuits on the minority side of the split, it is clear that public employers risk committing a First Amendment violation when they deny promotional opportunities (or other benefits of employment) to employees solely on the basis of the employee's past union affiliation and activity. In those circuits, concerns about a candidate's sympathy toward his/her former union that are based solely on past membership or a prior role as a union officer or representative, like those voiced by the township's business administrator in Palardy, would likely be considered an impermissible reason for denying a promotion. That does not appear to be the case in the circuits on the other side of the split — for the moment. When next presented with this issue, those courts may very well change position and adopt the minority view based on Janus's determination that public sector union activity necessarily involves

matters of public concern. Thus, for all public employers, it is advisable to proceed with extreme caution when considering a promotion candidate's prior union membership.

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[1] 138 S. Ct. 2448 (2018).

[2] Palardy v. Township of Millburn, No. 17-2597 (3d Cir. Sept. 28, 2018).

[3] See Garcetti v. Ceballos, 547 U.S. 410 (2006); Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

[4] 189 L.Ed.2d 620 (2014).